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No. 98-727

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Teresa L. Cunningham,
Petitioner,

v.

Hamilton County, Ohio,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY OF THE PETITIONER

Teresa L. Cunningham
(*Of Counsel*)
71 Cavalier Blvd.
Suite 131
Florence, KY 41042

Thomas C. Goldstein
(Counsel of Record)
Jonathan D. Schiller
BOIES & SCHILLER LLP
5301 Wisconsin Ave., NW
Washington, D.C. 20015
(202) 237-5677

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REPLY OF THE PETITIONER

This case calls on the Court to decide whether an attorney may appeal directly from a sanction order that is finally imposed prior to judgment. When the district court sanctioned Petitioner in the course of discovery, she immediately appealed. A divided panel of the Sixth Circuit dismissed the appeal for lack of jurisdiction, acknowledging that the great majority of circuits would reach the opposite result. This Court granted certiorari to resolve the conflict.

Petitioner contends that a sanction is final, and therefore appealable, when definitely entered. In this case, the district court entered a sanction of a definite amount in the middle of the case, so she appealed immediately. If the district court instead had deferred entering the sanction, Petitioner would have been obligated to defer her appeal as well. Alternatively, Petitioner contends that she was permitted to appeal immediately because, at the time of her appeal, she no longer was participating as counsel in the case.

Petitioner's view is most consistent with this Court's precedents and the policy considerations underlying the "*Cohen* doctrine." As Petitioner's opening brief explained, she is not a party to the final judgment. As such, she cannot appeal from the judgment but must instead appeal directly from the order that acts upon her. If an attorney such as Petitioner is not permitted to bring an immediate appeal, she will have no opportunity to contest the sanction at all.

In addition, the decision below will forbid an attorney from appealing until the end of a case even when a district court imposes a large monetary sanction in litigation that will not end for years. The attorney must bear both the financial burden and the serious professional stain of the sanction for a substantial time before receiving any opportunity for review. There is, moreover, no assurance

that the case ever will reach final judgment (whether through settlement or inattention) such that the attorney will have the opportunity to appeal.

In its brief on the merits, Respondent assumes that this Court must choose from two polar alternatives: permitting or forbidding *all* immediate appeals of attorney sanction orders. That is not correct, and the question is far more subtle. As noted above, Petitioner agrees with the Sixth Circuit and Respondent that many attorney sanctions are not immediately appealable. It is only when the district court finally enters the sanction during the pendency of the case – rather than awaiting the final judgment – that the attorney must appeal immediately or not at all. By permitting district courts to control whether an immediate appeal is available, Petitioner's approach appropriately balances the interest of district judges in controlling their proceedings and the interest of attorneys in securing review of orders that impose substantial and immediate burdens upon them.

ARGUMENT

I. The Sanction Imposed Upon Petitioner Satisfies the "*Cohen* Doctrine's" Three-Part Test Of Appealability.

A. The District Court's Order "Conclusively Resolved" Petitioner's Liability For Sanctions.

In a substantial change of position, Respondent (at 21-22) contends for the first time that the district court's order did not "conclusively resolve" Petitioner's liability for sanctions. Respondent previously had conceded this point in the Sixth Circuit and in its brief in opposition to certiorari. For its part, the Sixth Circuit found it "beyond dispute" that the district court's order in this case "conclusively resolved" the issue. App. 43. Even in this Court, it is not clear whether Respondent is contending that sanction orders *never* "conclusively resolve" the issue of sanctions (*see* Resp. Br. 6-7 (citing *In re Licht & Semonoff*, 796 F.2d 564, 570 (1st Cir. 1986), with approval)) or instead

that the specific order *in this case* did not "conclusively resolve" Petitioner's liability for sanctions (*see* Resp. Br. at 21-22). We therefore address both arguments in turn.

1. Sanction orders are "conclusive" under the *Cohen* doctrine. Respondent contends (at 6-7) that in the time between the entry of a sanction and the end of the case, "developments could result in the order's modification prior to final judgment on the merits. The court might rescind it, reduce it or increase it." But Respondent's position is foreclosed by the precedents discussed in our opening brief (at 13), which hold that an order is "conclusive" notwithstanding a district court's inherent authority to revise or amend it. It simply is insufficient to preclude an interlocutory appeal that, as Respondent puts it (at 23), "[t]he court could change its mind based upon any number of factors unique to a given case." Thus, Respondent's argument is correct "only in the technical sense that every order short of a final decree is subject to reopening at the discretion of the district judge," which is not relevant under the *Cohen* doctrine. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12-13 (1983); *see also Johnson v. Jones*, 515 US 304, 312 (1995) (applying this rationale to find orders denying qualified immunity "conclusive" despite the fact that they technically could be amended later); *Gulfstream Aerospace v. Mayacamas Corp.*, 485 US 271, 277 (1988) (explaining that this Court has "contrasted two kinds of nonfinal orders: those that are 'inherently tentative'" and therefore nonappealable "and those that, although technically amendable, are 'made with the expectation that they will be the final word on the subject addressed'" and therefore are deemed "conclusive" (citation omitted)).[1]

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[1] Respondent mistakenly relies (at 22) on then-Justice Rehnquist's concurring statement in *Firestone Tire & Rubber Co. v. Risjord*, 449 US 368, 381 (1981), that "an order denying a motion for disqualification" is tentative. With due respect to the Chief

2. Respondent is wrong to contend that the specific order in this case did not "conclusively resolve" Petitioner's liability for sanctions. Respondent misconstrues the facts of this case when it contends that there was a realistic chance that the district court would alter the sanction against Petitioner. The magistrate judge determined that Petitioner must pay Respondent $1,494.00. App. 21. The magistrate furthermore expressly rejected Petitioner's request that the sanction be stayed, ordering that it be paid "forthwith." *Id.* 20-21. Petitioner then filed objections in the district court. *Id.* 5, docket no. 110. Petitioner furthermore sought a stay in the district court, explaining that Respondent already was seeking to collect the sanction immediately. *Id.*; Ct. App. J.A. 41, 474. The district court, however, refused to enter a stay and affirmed the magistrate's order. App. 23-24.

Petitioner subsequently appealed the sanction to the Sixth Circuit. App. 6, docket no. 134. Upon filing the appeal, Petitioner moved in the district court for a "stay pending appeal." *Id.*, docket no. 133; Petr's Motion To Stay Collection of Sanctions Pending Appeal at 1-2 (requesting "an order staying collection of sanctions" because Petitioner, "feeling aggrieved by the [sanctions] order, has appealed to the Sixth Circuit Court of Appeals from the Order"). The district court, having previously denied Petitioner's earlier motions for a stay, granted this request for a stay pending appeal. *Id.*, docket no. 138.

Justice's views, a majority of the Court disagreed. *Id.* at 375-76 (Opinion of the Court) ("An order denying a disqualification motion meets the first part of the 'collateral order' test. It 'conclusively [determines] the disputed question,' because the only issue is whether the challenged counsel will be permitted to continue his representation."). Moreover, even the Chief Justice's statement would, in the context of sanction orders, suggest only that a district court's *refusal* to award sanctions is tentative and nonappealable.

Respondent suggests that the district court left open the possibility that it would revise the sanction at a later date. But Respondent cannot cite any suggestion by either the magistrate judge or the district judge to that effect, and none exists. In particular, nothing in the district court's order granting a stay pending appeal suggests that the district court would ever revisit the sanction and, in point of fact, the district court never did so. The order therefore is final because there is "no basis to suppose that the District Judge contemplated any reconsideration of his decision." *Moses H. Cone Mem. Hosp.*, *supra*, 460 US at 12-13.

3. Respondent is wrong to rely on the stay of collection entered by the district court after Petitioner filed her appeal. Respondent makes the related argument that the order in this case did not "conclusively resolve" Petitioner's liability for sanctions because the district court entered a stay of collection pending appeal. Here, Respondent is wrong on both the facts and the law.

Respondent contends that the district judge "affirmed the sanctions by Order on October 22, 1996, but granted a stay pending final disposition" (Resp. Br. at 4) and, as a result, "[t]he case could have settled and the sanctions rescinded by the Court as part of the settlement agreement" (*id.* at 22).[2] Respondent misstates the facts. The district judge on October 22, 1996, did *not* enter a stay. To the contrary, Petitioner had requested a stay (App. 5, docket no. 110; Ct. App. J.A. 41, 474), but the district court refused to grant it. Instead, the district court on that date affirmed the magistrate's sanction order, including the requirement that Petitioner pay the sanction "forthwith." App. 23-24, 20-21.

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[2] As a separate matter, a settlement resolves the matter between the parties, not the attorneys. For the attorney to pursue a settlement that would resolve sanctions against herself would raise the real specter of a conflict of interest.

It was only in response to Petitioner's later motion for a stay pending appeal, which Petitioner filed after appealing to the Sixth Circuit, that the district court entered a stay. App. 5, docket no. 138. The district court's order expressly states that Petitioner's motion for a stay pending appeal is "granted." App. 6, docket no. 138. This is the process contemplated by FRAP 8, which provides that an appellant "must ordinarily move first in the district court . . . for a stay of the judgment or order of a district court." Such a stay, granted after the appeal already has been lodged, cannot deprive the district court's order of finality. The very purpose of a stay pending appeal is to permit the appeal to proceed without prejudice, not to preclude the appeal from occurring.

Respondent also is wrong as a matter of law to contend that a stay of collection renders a sanction order nonappealable. Because the relevant statute provides jurisdiction over all "final decisions" (28 USC 1291), Petitioner submits that an attorney sanction is appealable when finally entered. In this context, "finality" requires that the district court do two things: (i) definitely enter the sanction without regard for the final judgment; and (ii) definitely set a specific monetary amount to be paid. An immediate appeal therefore may be taken from a district court order directing an attorney to pay forthwith a specific monetary sanction. By contrast, no immediate appeal is permitted if the district court states that the sanction will be finally entered at the close of the case or will be merged into the final judgment, or the district court leaves the amount of the sanction to be determined later.

Contrary to Respondent's reference to collection of the sanction, the attorney's obligation to pay is relevant, but not determinative, of finality. Respondent thus has confused a stay of *collection* with a stay of *entry* of the sanction order. For example, if the district court provides that the attorney has sixty days to pay the sanction or that collection is stayed

pending the end of the case, the sanction nonetheless is final. As with all district court orders, under FRAP 4 a notice of appeal "must be filed with the district court clerk within 30 days after the judgment or order appealed from is *entered*" (emphasis added). A stay of collection does not fall within the class of orders that tolls the time to appeal under FRAP 4. *Browder v. Director, Dep't of Corr.*, 434 US 257, 264-65 (1978).

In this case, the district judge's sanction order was final and therefore immediately appealable. The sanction was entered definitely and without regard to the final judgment. In turn, the district court specifically affirmed both the magistrate's order that Petitioner pay the sanction "forthwith" and also the magistrate's determination that $1,494.00 was due. Although the district court stayed collection of the sanction after Petitioner appealed, the district court did *not* stay the entry of the sanction order itself. Moreover, as noted above, the district court gave absolutely no indication that it would revisit either the entry of the sanction or the amount that Petitioner must pay.

B. The Sanction Order Resolved An "Important Question" Distinct From The Merits.

1. Petitioner's appeal raises an "important question" under the *Cohen* doctrine. Respondent contends (at 24) that an attorney sanction order is not sufficiently "important" to satisfy the *Cohen* doctrine because, on Respondent's reading, this Court's precedents limit interlocutory appeals to questions of "a Constitutional level." But Respondent's citations of this Court's decisions are highly selective. No decision of this Court states that interlocutory appeals are limited to constitutional questions and many decisions permitting interlocutory appeals disprove Respondent's claim. *E.g.*, *Quackenbush v. Allstate Ins. Co.*, 517 US 706 (1996) (interlocutory appeal of remand to state court under *Burford* abstention); *Moses H. Cone Mem. Hosp. v. Mercury*

Constr. Corp., 460 US 1 (1983) (stay of federal court litigation pending state suit); *Eisen v. Carlisle & Jacquelin*, 417 US 156 (1974) (allocation of costs of notice to class members); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) (stay of case under *Pullman* abstention and refusal to convene a three-judge court); *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 US 684 (1950) (vacating attachment of a vessel in admiralty); *Cohen v. Beneficial Indus. Loan Corp.*, 337 US 541 (1949) (refusal to compel plaintiffs to post a bond in a shareholder derivative action); *Railroad Trainmen v. Baltimore & O. R. Co.*, 331 US 519 (1947) (denial of intervention as a matter of right).[3]

In addition, attorney sanctions cannot be analogized to the facts of the only case in which this Court suggested that a question was not sufficiently "important" to permit an interlocutory appeal. In *Digital Equip. Corp. v. Desktop Direct*, 511 US 863 (1994), the defendant invoked a prior settlement agreement in an effort to dismiss the plaintiff's suit. The district court refused, and this Court held that no immediate appeal was permissible. 511 US at 884. The Court specifically concluded that the defendant's interest in an immediate appeal was not sufficiently "important" because (i) the defendant could appeal the refusal to dismiss at the end of the case (*id.* 881), and (ii) the defendant could institute a separate action against the plaintiff for the costs of defending the suit (*id.* at 882). As we explain below,

[3] Respondent specifically errs in relying on this Court's precedents permitting interlocutory appeals of qualified immunity rulings. Such appeals do not involve the abstract constitutional question of "qualified immunity," but instead address whether a particular legal proposition was "clearly established" at the time of the defendant's conduct. *Any* legal proposition that forms the basis for the plaintiff's cause of action – whether constitutional or statutory, and whether or not of great magnitude – may be raised in such an appeal.

neither of those considerations applies here. Petitioner cannot appeal at the end of the case and, even if she could, she has no recourse for the injury she suffers if the sanction remains outstanding until final judgment.[4]

2. The questions raised by Petitioner's appeal are "separate from the merits." Respondent's contention that attorney sanction orders are not sufficiently "separate from the merits" for purposes of the *Cohen* doctrine simply repeats the error of the majority below. This Court's precedents distinguish appeals that are intertwined with the *legal claims* of the underlying case, which may not be brought, from appeals that are intertwined with the *facts* of the underlying case, which may. *See generally* Petr's Open. Br. at 15-17. Thus, "the *Cohen* 'separability' component asks whether the question to be resolved on appeal is conceptually distinct from the merits of the plaintiff's claim. The appropriate comparison, then, is between the decision sought to be reviewed and *the claim underlying the action itself*." *Behrens v. Pelletier*, 516 US 299, 309 n.3 (1996) (emphasis added) (quotation marks and citation omitted).

This distinction is eminently sensible. When the appeal relates only to the facts of the underlying case, as opposed to the legal claims, "review now is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once, and also seems less

[4] Respondent also is wrong in its assertion of a slippery slope. BIO 23 ("If, as the Petitioner claims, this is an important right because of the financial hardship imposed on the Petitioner, then denial of sanctions should be appealable immediately as well.") We agree that a district court order refusing to impose a sanction raises an important question. But such an order does not satisfy the remaining *Cohen* requirements. In particular, the party who unsuccessfully seeks the sanction is a party to the final judgment and, accordingly, may bring such an appeal at the end of the case.

likely to delay trial court proceedings (for, if the matter is truly collateral, those proceedings might continue while the appeal is pending)." *Johnson v. Jones*, 515 US 304, 311 (1995).

This Court specifically has rejected Respondent's contrary position in precedents addressing appeals of qualified immunity rulings, which Respondent ignores. The government defendants in those cases immediately appealed district court rulings that various legal propositions were "clearly established." This Court rejected the plaintiffs' contention that the "factual overlap between a collateral issue and the merits of the plaintiff's claim is fatal to a claim of immediate appealability." *Mitchell v. Forsyth*, 472 US 511, 529 n.10 (1985). As *Johnson v. Jones* (*supra*, 515 US at 314) explains, an order that relates to the facts of the underlying case is immediately appealable if it "nonetheless raises a question that is significantly different from the questions underlying [the] plaintiff's claim on the merits." *Mitchell* (*supra*, 472 US at 528) specifically explains that the more narrow view of appealability now pressed by Respondent is foreclosed by precedents permitting immediate appeals "when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit because the complained of conduct falls within the protections of the Speech and Debate Clause."[5]

The sanction order in this case, and sanction orders generally, have nothing to do with "the claim underlying the

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[5] In arguing to the contrary, Respondent (at 26-27) invokes the conclusion of *Richardson-Merrell, Inc. v. Koller* (472 US 424, 439 (1985)) that "[a]ppellate review of orders disqualifying counsel for misconduct may be entwined with the merits of the litigation." But Respondent fails to note that the Court in *Mitchell* specifically *refused* to extend *Richardson-Merrell* to forbid appeals that involve the facts of the underlying case. 472 US at 529 n.10.

action" (*Behrens v. Pelletier*, *supra*, 516 US at 309 n.3) or "the merits of the plaintiff's claim" (*Mitchell v. Forsyth*, *supra*, 472 US at 529). Respondent does not contend otherwise. Thus, in this case, the plaintiff alleged that Respondent was liable for the suicide death of Casey Starcher because Respondent's agents failed to supervise Casey despite his known depression and history of suicide attempts. That claim does not bear on Petitioner's appeal, which relates instead to the process used by the magistrate in imposing sanctions, the amount of fees awarded to Respondent, and to Petitioner's justification for noticing the deposition of a witness on one date rather than another. *See* Petr's Open. Br. 5, 9-10.

Respondent furthermore proves Petitioner's point by invoking Sixth Circuit's standard for reviewing discovery sanctions. As Respondent explains, in reviewing Petitioner's appeal,

> the Court of Appeals would have been required to consider and rule on the following issues: prejudice to the sanctioned party's adversary; whether the sanctioned party was warned that failure to cooperate could lead to an adverse judgment; whether less drastic sanctions were imposed or considered; and the degree of willfulness or culpability of the recalcitrant party.

Resp. Br. 27-28 (quoting *Taylor v. Medtronics, Inc.*, 861 F.2d 980, 986 (6th Cir. 1988)). None of these inquiries relates to the merits of the plaintiff's claim against Respondent for the death of Casey Starcher.

Nor can Respondent persuasively distinguish two cases in which this Court squarely held that sanctions are collateral to the merits of the underlying litigation. *Willy v. Coastal Corp.*, 503 US 131 (1992); *Cooter & Gell v. Hartmarx Corp.*, 496 US 384 (1990); *see also* Petr's Open. Br. at 14 n.4 (collecting additional authorities). As Respondent explains (at 27-28), those decisions hold that sanctions may be awarded after the entry of judgment in the

underlying case. But the timing of the sanctions is irrelevant for present purposes. The Court's *rationale* in both cases was that sanctions are collateral to the merits of the underlying suit, and that rationale applies fully here. *See Willy*, *supra*, 503 US at 137 (sanctions are "collateral to the merits"); *Cooter & Gell*, *supra*, 496 US at 396 (a sanction order "requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate"); *accord* Resp. Br. 28 (in *Cooter & Gell*, "[t]he Rule 11 sanction did not require the district court's assessment of the legal merits of the complaint").

C. The Sanction Order Was "Effectively Unreviewable" On Appeal From The Final Judgment.

1. Attorneys may not appeal from the final judgment. Petitioner devoted the single largest section of her opening brief (at 17-28) to explaining why, under this Court's precedents, she is not a party to the underlying suit with a right to appeal from the final judgment. Thus, Petitioner carefully addressed this Court's decisions establishing that (i) only parties may appeal a final judgment (at 17-19 (citing fifteen decisions)); (ii) nonparties may only appeal orders punishing them directly (at 20-24 (citing seven decisions)) and (iii) attorneys are nonparties for purposes of the right to appeal (at 24-25 (citing three decisions)). In arguing that Petitioner can appeal the final judgment, Respondent does not address *a single one* of these precedents. Instead, Respondent sets out block quotations from those courts of appeals that, like the Sixth Circuit in this case, forbid interlocutory appeals.

We are at a loss for how to reply. We acknowledge that several courts of appeals have held that an attorney may contest a sanction by bringing an appeal from the final

judgment. Those holdings are wrong.[6] The quotations invoked by Respondent are no more persuasive than the contrary statements that Petitioner could set forth from other courts of appeals that disagree. After all, Respondent is defending the *minority* position in the circuits. In particular, the decisions quoted by Respondent do not contain any analysis of this question. Instead, each simply states that an appeal is permitted at the end of the case; none discusses the relevant precedents from this Court. The only possible exception is the acknowledgment of the majority below (App. 41-42) that, under *Alexander v. United States* (201 US 117 (1906)), a nonparty may incur a contempt sanction and thereby secure the right to immediately appeal a discovery order. But as Petitioner explained in her opening brief (at 21-22), *Alexander* is not limited to contempt citations and instead supports the conclusion that attorney sanctions are immediately appealable.

The only precedents that Respondent does discuss are inapposite. Respondent notes (at 30) this Court's holding that attorney disqualification orders are not immediately appealable. *Richardson-Merrell, Inc. v. Koller*, 472 US 424 (1985); *Flanagan v. United States*, 465 US 259 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 449 US 368 (1981). But Respondent does not explain how the disqualification cases apply to these facts, and they do not. Unlike attorney

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[6] We specifically do not understand Respondent's lengthy exegesis on *Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983) (holding that interlocutory appeals of attorney sanctions are permitted), and the subsequent treatment of that decision in the Second Circuit. *See generally* Resp. Br. at 31-32. Although one panel of the Second Circuit later criticized *Cheng* (*see Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir.). *cert. denied*, 118 S. Ct. 337 (1997)), the relevant point (if one exists) is that the Second Circuit has permitted interlocutory appeals of attorney sanctions in at least nine decisions (*see* Pet. 10 & n.4), never reaching a contrary result and never adopting a contrary rule *en banc*.

sanction orders, which must be appealed by the *attorney* (*see supra*), disqualification orders must be appealed by the *party* (*see Richardson-Merrell, Inc. v. Koller*, *supra*, 472 US at 434-35). Unlike the attorney, the party has a right to appeal from the final judgment, which led the Court to conclude that "the propriety of the trial court's disqualification order can be reviewed as effectively on appeal of a final judgment as on an interlocutory appeal." *Id.* at 438.

Even if an attorney were regarded as a party with a right to appeal the final judgment, a sanction would be "effectively unreviewable" in such an appeal. First, because most cases settle, it is not at all clear that a particular suit *ever* will result in an appealable final judgment. Second, the attorney suffers a substantial injury in the interim between the sanction order and any appeal from the final judgment. The attorney is rebuked publicly by the district judge for failing to abide by her duties as an officer of the court. It is not surprising, therefore, that Respondent repeats time and again that the order in this case describes Petitioner's conduct as supposedly "egregious." The stain of that rebuke remains with the attorney throughout her career unless overturned on appeal. The stigma of such a sanction can deter potential clients and eliminate other professional opportunities. In addition, the attorney can be made to pay a substantial fine (in the tens of thousands of dollars) out of pocket. It is not a sufficient remedy for the attorney to be required to appeal at the end of the case, which may not come for years in the future, and which lies outside the control of the attorney.

2. Nonparticipating attorneys, in particular, are not parties with a right to appeal from the final judgment. The Sixth Circuit's view that Petitioner is a "party" is particularly strained given that Petitioner was no longer serving as counsel at the time she filed her notice of appeal. Respondent contends (at 35) that "[t]here is no rational basis

for conferring greater rights on an attorney who is disqualified than upon one who is not. Both can await the outcome of the merits before appealing." But this argument, of course, begs the question. When an individual such as Petitioner appeals an order against her, and at the time of her appeal she does not represent any of the parties to the suit, she cannot seriously be described as a "party" to the action. The final judgment subsequently entered by the district court has no effect at all upon the attorney, and there is no basis to conclude that she has standing to appeal from it. As such, an interim sanction order is "effectively unreviewable" in an appeal from the judgment.

Moreover, there *are* important practical differences between an attorney who is participating in the case and one, such as Petitioner, who is not. A nonparticipating attorney has no control over, or interest in, the district court proceedings. Respondent's contention that an attorney sanction could be resolved through a subsequent settlement therefore lacks all force here. In point of fact, the underlying suit may reach final judgment without ever coming to the attention of the attorney, who would thereby lose her right to appeal. *See* FRAP 4 (notice of appeal must be filed within thirty days).

Nor are the practical concerns raised by the Sixth Circuit persuasive. Although the majority below wondered which event (sanction or removal from the case) should trigger the right to appeal (App. 47), the logical rule would be based upon whichever event occurs later. The majority below also believed that, if interlocutory appeals by nonparticipating attorneys were permitted, "litigants confronted with especially skilled or tenacious counsel could move for sanctions in a calculated attempt to force the attorney to withdraw from the case." *Id.* This scenario is far fetched and we have seen no evidence of it occurring in the several circuits that permit such appeals. It assumes that a party would move for sanctions, *prevail*, and then force

the opposing counsel out of the case. But parties with meritorious motions for sanctions presumably already bring them. In addition, it would be very odd for an attorney to appeal in an effort to recoup the amount of the sanction when, in order to do so, she must first withdraw from the case and thereby sacrifice her income from it.

II. An Immediate Appeal Is Consistent With The Policies Underlying The "Final Judgment" Rule.

1. Petitioner's proposal would result in only a limited number of appeals. Respondent's principal contention is that, by permitting an immediate appeal in this case, the Court would create an extraordinary burden on the courts of appeals and district courts. But Respondent's hypothesis cannot overcome the actual facts. As Petitioner explained in her opening brief, the rule that Petitioner endorses has been applied by several circuits for many years. Respondent chooses simply to ignore this data, which establishes that the courts of appeals have not experienced any of the burden Respondent predicts. *See* Petr's Open. Br. 29 (Second Circuit: eight appeals in fifteen years; Seventh Circuit: five appeals in fifteen years; Ninth Circuit: nine appeals in twenty years). The data is even more striking regarding Petitioner's alternative argument that an immediate appeal is permissible if the attorney no longer is participating in the case: only nine such appeals *ever* have been brought in the courts of appeals. *Id.* 30. Nor does Respondent contest the great value of these appeals, as more than two thirds result in decisions reversing the sanction in whole or part. *Id.* 30-31.[7]

[7] Petitioner agrees with Respondent that no logical "dollar threshold" exists at which appeals of sanction could be permitted. Resp. Br. 17. But this point *supports* a finding of appealability. Attorneys are unlikely to invest the effort and expense to appeal small sanctions. But on Respondent's view, attorneys are forbidden from directly appealing immediately executable sanctions in the tens of thousands of dollars, even when the underlying litigation may continue for years.

Respondent also is wrong to contend (at 16-17) that Petitioner's proposal would open the door to many other classes of appeals. The few examples that Respondent gives are distinguishable because they apply to a party and therefore merge into the final judgment. As such, they may be appealed at the end of the case. "[S]anctions imposed against the parties [and] jointly against the parties and counsel" (Resp. Br. 16) by definition act upon a party.[8] An order "foreclosing a defense or prohibiting the introduction of evidence" (*id.* 17) similarly applies to the party, not the attorney.[9]

[8] There is also a practical reason for distinguishing the appealability of orders sanctioning attorneys from those jointly sanctioning clients and their attorneys. Because joint sanctions may give rise to disputes between the client and attorney over who should pay the sanction, both should be participants in the appeal. Given that the party cannot take an interlocutory appeal, review of the sanction should await final judgment. In addition, when the sanction applies to the party, there is a much more realistic chance that it will be resolved through settlement.

[9] Respondent does not explain its remaining example, "an order requiring the offending attorney to travel to an inconvenient locale." Resp. Br. 17. Presumably, Respondent is imagining that a deposition or production of documents would occur at the locale (rather than the attorney being required to travel for the sake of traveling). But we could not formulate a set of facts on which the judge would direct a particular, named attorney (rather than simply a party's counsel) to conduct the deposition or document production. Ordinarily, a party has the right to decide who will represent her. The order Respondent imagines therefore would seem to operate upon the party, and therefore would be incorporated into the final judgment.

2. Petitioner's proposal would not interfere with district court and appellate proceedings. Respondent incorrectly assumes that a ruling in Petitioner's favor would render all attorney sanctions immediately appealable and thereby disrupt district court proceedings. In reality, under Petitioner's proposal, the district judge has it within her control to decide whether an immediate appeal is available. The judge can elect to enter the sanction finally at the end of the case, or to merge the sanction into the final judgment, thereby deferring the attorney's right to appeal. In those limited instances that the judge decides that an immediate sanction is required, the attorney should have the parallel right to contest the sanction.

But even when an interlocutory appeal is taken, no disruption results to the district court proceedings. Many immediate appeals result in stays of district court proceedings because the outcome on appeal will affect either the course of the litigation or the judgment on the merits. *E.g.*, *Richardson-Merrell, Inc. v. Koller*, 472 US 424, 434 (1985) ("When an appellate court accepts jurisdiction of an order disqualifying counsel, the practical effect is to delay proceedings on the merits until the appeal is decided."). But that is not true when the issue on appeal is an attorney sanction, which is collateral to the underlying case and is unrelated to the judgment. As this case amply demonstrates, the underlying litigation continues through final judgment while the sanction is reviewed on appeal. *Accord* Resp. Br. 13 ("Petitioner appealed from two sanction awards, while the merits continued to run along a parallel track.").

Nor do appeals of attorney sanctions misuse appellate resources. Many interlocutory appeals are disfavored principally because the question on appeal may become "moot or irrelevant by the end of trial." *Stringfellow v. Concerned Neighbors in Action*, 480 US 370, 380 (1987). That is not so with attorney sanctions. As Petitioner

explained in her opening brief (at 17), and Respondent does not deny, "[t]he sanction order is imposed upon the attorney personally, and the calculus of the risks and benefits of appeal will not be changed by a decision on the merits." Nor is there any concern that an immediate appeal would "waste judicial resources by requiring repetitive appellate review of substantive questions in the case" (*Van Cauwenberghe v. Biard*, 486 US 517, 527-28 (1988)). As we explained above, sanction orders are collateral to the merits, and therefore the court of appeals will not face the same issue on an appeal of the final judgment.[10]

III. At The Very Least, The Sixth Circuit Should Have Permitted Petitioner's Appeal Under FRAP 4(a)(2).

Respondent presents no substantial response to Petitioner's argument that her notice of appeal was timely under the plain meaning of FRAP 4(a)(2). Although Respondent is correct (at 37) that Petitioner did not raise this argument below, Petitioner *could not* have done so. Petitioner filed her brief on appeal before the district court entered its final judgment and therefore could not request that the Sixth Circuit apply FRAP 4(a)(2).

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[10] Finally, Respondent is wrong to rely on the other mechanisms that exist for taking an interlocutory appeal, such as certification under 28 USC 1292, writs of mandamus, and partial final judgments under FRCP 54(b). None of those mechanisms have anything to do with attorney sanction orders. In point of fact, so far as our research reveals, *none* of them ever has been held to permit an appeal from an attorney sanction. Certification under section 1292(b) applies only to appeals that "may materially advance the ultimate termination of the litigation." Writs of mandamus are used "only in extraordinary situations," and traditionally "only to confine an inferior court to a lawful exercise of its jurisdiction." *Kerr v. United States District Court*, 426 US 394, 402 (1976); *Will v. United States*, 389 US 90, 95 (1967). And, FRCP 54(b) applies only to "claim[s] for relief . . . presented in an action."

Respondent does not deny that, as was the case in *Firstier Mortgage Co. v. Investors Mortgage Co.* (498 US 269 (1991)), Petitioner's "confusion [was] understandable" and that "[l]ittle would be accomplished by prohibiting the court of appeals from reaching the merits of [Petitioner's] appeal." In fact, Respondent contends only that Rule 4(a)(2) is "designed to protect the party who appeals a decision, announced by the court, before the judgment entry [*sic*] is filed." Resp. Br. 37. But that is precisely what occurred in this case. When the district court entered its sanction order, Petitioner appealed. The district court subsequently entered its final judgment while Petitioner's appeal was still pending in the Sixth Circuit. In the words of the rule, because Petitioner's "notice of appeal [was] filed after the court announce[d] a decision or order–but before the entry of the judgment or order–[her appeal] is treated as filed on the date of and after the entry."

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Sixth Circuit in this case be reversed.

Respectfully submitted,

Teresa L. Cunningham
(*Of Counsel*)
71 Cavalier Blvd.
Suite 131
Florence, KY 41042

Thomas C. Goldstein
(Counsel of Record)
Jonathan D. Schiller
BOIES & SCHILLER LLP
5301 Wisconsin Ave., NW
Washington, D.C. 20015
(202) 237-5677

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